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IN THE

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1930.**

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# No. 111

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GO-BART IMPORTING COMPANY, INC.; PHILIP D. GOWEN AND WILLIAM BARTELS, PETITIONERS,

*v.*

THE UNITED STATES.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

---

## BRIEF FOR PETITIONERS.

---

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## BRIEF FOR PETITIONERS.

---

### Opinions of the Courts Below.

The opinion of the District Court for the Southern District of New York, dated December 9, 1929 (R.

54-57), is not reported. The order of Coxe, J., denying motion for the return of certain papers and documents to the petitioners herein, and motion to re-argue was entered December 27, 1929 (R. 63). This order was affirmed in part and modified in part by the Circuit Court of Appeals for the Second Circuit by opinion of Swan, J., April 14, 1930 (R. 69-79). This decision is reported in 40 Fed. (2d) 593.

## Jurisdiction.

The decree of the Circuit Court of Appeals to be reviewed was entered on April 15, 1930 (R. 79). Petition for certiorari was filed May 12, 1930, and certiorari was granted June 2, 1930 (R. 80) (281 U. S. 719). The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936).

## Questions Presented.

Whether petitioners are entitled to the return of documents alleged to have been illegally seized as an incident to the arrest of petitioners Gowen and Bartels, the two principal officers of petitioner Go-Bart Importing Company, Inc., and to the suppression of such documents as evidence. This question in turn involves the further questions—

(*a*) Whether the arrest was valid.

(*b*) Whether under any circumstances the ransacking of desks and safes in a general and exploratory search for incriminating papers is justified as an incident of an arrest.

(*c*) Whether in the absence of a crime being committed books and papers not forming the instruments of crime may be seized without a search warrant.

**Statement of Facts.**

On June 6, 1929 (R. 55), Eugene O'Brien, an agent of the Prohibition Bureau, accompanied by two other Prohibition agents, went to the offices of petitioner Go-Bart Importing Co. at 200 Fifth Avenue, New York City, bearing a certified copy of a warrant for the arrest of petitioners Philip D. Gowen, William Bartels and thirty-three others. The warrant was addressed to the United States Marshal for the Southern District of New York and his deputies, and charged the persons to be arrested with conspiracy to violate the National Prohibition Act (R. 18). The Prohibition agents were not accompanied by the marshal or any of his deputies (R. 15).

Petitioner Bartels, Secretary of the Go-Bart Importing Co. and one George Heath named in the warrant, an employee, were peacefully sitting in the offices at the time of the entry of the agents (R. 13, 14).

When requested to state their business, the agents exhibited a document which they claimed to be a search warrant authorizing a search of the premises (R. 8, 13), which appears to have been the warrant of arrest referred to above.

Shortly thereafter Petitioner Gowen, president of the company, entered the premises (R. 3) and O'Brien exhibited this paper to him, again claiming it to be a search warrant (R. 3). Petitioners Gowen and Bartels and employees Heath and one Gardiner

were arrested after the search say the petitioners (R. 14), before the search say the agents (R. 32).

The agents took from Gowen's person some keys, and under threat of breaking into his desk and safe forced Gowen to open them. The desk and safe were then searched and from them the agents took certain papers, documents and property, including journals, insurance policies, cancelled checks, index cards and other miscellaneous property. The agents rummaged at will through the other desks belonging to the company, taking therefrom papers of the same nature (R. 4, 9, 14). No receipts were given for the articles taken (R. 4, 9, 14).

The warrant in question was issued by United States Commissioner Garrett W. Cotter on June 5, 1929 (R. 18) based on a complaint sworn to by William J. Calhoun, Special Agent in Charge, Bureau of Prohibition, New York City (R. 19), alleging on "information and belief" that between January 1, 1929, and June 5, 1929, the parties named, including petitioners Gowen and Bartels and thirty-three others did illegally conspire to commit a nuisance against the United States by transporting, selling, dealing in, etc. intoxicating liquors in violation of the National Prohibition Act (R. 20). The only overt act alleged is the purchase on May 23, 1929, by defendant George Heath of one Peerless automobile (R. 21).

This complaint it is now conceded was insufficient and totally invalid (R. 55).

Petitioners Gowen and Bartels were arraigned before Commissioner Cotter on a complaint of conspiracy

(R. 14). There has been no hearing on this complaint (R. 60).

After the proceedings herein were commenced, the prohibition agents attempted to justify their procedure by asserting that one Braidwood, an informer and alleged accomplice of petitioners, not a Government employee, had told Agent Calhoun, who in turn had told Agent O'Brien, that petitioners bought and sold liquor in violation of the prohibition law (R. 28-30). An elaborate affidavit was submitted by Braidwood in this proceeding alleging facts tending to show petitioners guilty of such crime during a period prior to that set forth in the complaint of Agent Calhoun (R. 21-28). Calhoun's affidavit stated he had independently investigated Braidwood's information and found it to be true, but that "the sources of these independent investigations conducted by deponent cannot be disclosed consistently with public justice" (R. 29). Calhoun's affidavit further stated he had assigned Agent O'Brien to further investigate the case (R. 30).

O'Brien's affidavit admitted that he had made no independent investigation and had relied upon the statements made to him by Agent Calhoun (R. 32). Both O'Brien and the two officers accompanying him made affidavits in which they denied that they had made the arrests and conducted the search upon the assumed authority of the warrant (R. 32, 51, 53).

District Judge Coxe held this denial false in the following language (R. 55):

> "Indeed, it is insisted by the Government that no use was made of the warrant at the time of

> the arrest, and that Agent O'Brien only took the papers with him 'for the purpose of reference as to the addresses of the various defendants.' This, however, is contradicted by the defendants Gowen and Bartels, who state in their moving affidavits that Agent O'Brien described the papers to them at the time of the arrest as 'search warrants', and exhibited them to justify the demand for a search of the offices. On that issue, I am inclined to accept the story of the defendants, as I do not think it is at all reasonable to suppose that the prohibition agents did not make some use of the warrant when challenged to show the authority under which they were proceeding in making the arrests. And I am satisfied they were challenged to show their authority, as arrests and seizures of the kind described in these papers are not ordinarily made without some demand for credentials."

Judge Coxe, however, denied the relief sought on the ground that the agents had reasonable cause to believe the petitioners guilty of a felony; that the arrest was therefore valid; and that the search was valid as an incident to such arrest.

But Judge Coxe said (R. 57):

> "In disposing of this motion as above indicated, I do not wish to be understood as approving the practice followed by the Government in making these arrests. I can see no adequate reason why arrests of this kind should not be made by the United States Marshal under valid warrants issued in advance, and I think it would be most unfortunate if any other practice should be generally followed."

The order of the District Court was affirmed by the Circuit Court of Appeals except in one respect (not material here), as to which it modified the order (R. 79).

**Specification of Errors to Be Urged.**

1. The Circuit Court of Appeals erred in affirming the order of the court below denying the motion for the return of the books and papers and the suppression of the same as evidence.

2. The Circuit Court of Appeals erred in holding that the arrests were legal.

3. The Circuit Court of Appeals erred in holding that the arresting officers acted upon reasonable and probable cause in making the arrests when the information of the officers was admittedly obtained from others and not the result of their own investigation.

4. The Circuit Court of Appeals erred in sustaining the legality of the search and seizure made herein.

5. The Circuit Court of Appeals erred in holding that there is no distinction between the seizure of papers and documents that are incriminatory evidence of a crime and those which are the means by which it is carried on.

6. The Circuit Court of Appeals erred in sustaining a general and exploratory search of premises occupied as an office by petitioners, without the authority of a search warrant and in the absence of evidence of crime being committed therein.

## SUMMARY OF ARGUMENT.

The points to be argued herein are:

**I. The arrest of petitioners was illegal.**

(*a*) The warrant of arrest was based upon an insufficient complaint.

(*b*) Even assuming the warrant of arrest to have been properly issued, the arrest under it was nevertheless invalid because it was not executed by a United States Marshal or one of his deputies.

(*c*) No felony or misdemeanor had been committed or carried on in the presence of the officers.

(*d*) The officers had no reasonable grounds for believing that a felony had been committed.

(*e*) Reasonable or probable cause does not exist where the officer obtained his information solely from a superior officer who in turn obtained it from the unsworn statement of another.

(*f*) Probable cause which is insufficient as the basis for a warrant of arrest is insufficient to justify an arrest without a warrant.

**II. The search and seizure of petitioners' books and papers was an "Unreasonable search and seizure" in violation of the Fourth and Fifth Amendments.**

(*a*) A general and exploratory search of the office of petitioners in which they were arrested, made without the authority of a search warrant, is illegal.

(*b*) The seizure of books and papers located on premises where an arrest is made is illegal where the

books and papers are not the means or fruits of the crime but are merely private papers of the petitioners.

(*c*) A search to secure evidence to be used against defendants in a criminal proceeding is within the constitutional prohibition.

(*d*) An unlawful search and seizure may not be justified by what is found.

**III. The books and papers seized should be returned to petitioners and the evidence obtained through the seizure should be suppressed.**

FIRST POINT

**THE ARREST OF PETITIONERS WAS ILLEGAL.**

(*a*) *The warrant of arrest was based upon an insufficient complaint.*

The validity of the arrest in this case cannot be sustained by reason of the warrant issued for the arrest of the petitioners Gowen and Bartels. That warrant was improperly issued in violation of the Fourth Amendment to the Constitution which reads as follows:

> "* * * no warrants shall issue, but upon probable cause, supported by oath or affirmation. * * *."

It also violated the requirements of the New York Code of Criminal Procedure, which provides:

> "Sec. 148. When an information is laid before a magistrate, of the commission of a crime,

> he must examine on oath the informant or prosecutor, and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them.
>
> "Sec. 149. The depositions must set forth the facts stated by the prosecutor and his witnesses, tending to establish the commission of the crime and the guilt of the defendant."

The mode of procedure under the New York law is made applicable here by reason of Section 591 of Title 18 U. S. Code Annotated (formerly Rev. Stat. Sec. 1014).

The complaint of William J. Calhoun does nothing more than state (R. 20):

> "* * * upon information and belief * * *. That * * * beginning on January 1, 1929, and continuing on each and every day thereafter down to and including the date of the filing of this complaint * * * Philip D. Gowen * * * William Bartels * * * did * * * conspire * * * to commit a nuisance against the United States, that is to say, to unlawfully, willingly, and knowingly possess, import, export, transport, barter, sell, furnish, deliver, solicit, and receive orders for intoxicating liquor * * * in violation of * * * the National Prohibition Act * * *."

The complaint concludes with the recital of one overt act, namely, the purchase by one of the defendants of one Peerless automobile.

It is to be noted that the complaint does not even state a crime inasmuch as there is no such crime as committing a nuisance against the United States. The National Prohibition Act makes the *maintaining* of a nuisance, which is defined as a place where intoxicating liquors are "manufactured, sold, kept or bartered" (Sec. 33 of Title 27, U. S. C. A.) a crime. It is clear, however, that the complaint does not charge the commission of that crime and that Calhoun did not mean to charge the commission of that crime but probably meant to charge the commission of a conspiracy to commit an offense against the United States in violation of Section 88 of Title 18 of U. S. C. A., Sec. 37 of U. S. C. C.

However, quite apart from the fatal defect in failing to charge a crime, the complaint is also bad because it was made solely on information and belief, did not set forth the source of the affiant's information and belief, and stated no facts tending to show the commission of a crime by the defendants.

This Court passed on the question in *Ex parte Burford*, 7 U. S. (3 Cranch.) 448, decided in 1806, and in an opinion written by Chief Justice Marshall, held that a warrant of arrest issued upon an affidavit based upon "the information, testimony and complaint of many credible persons" was illegal "for want of stating some good cause certain, supported by oath."

Later in *Rice v. Ames*, 180 U. S. 371 (1901), the question arose in an extradition proceeding where the validity of the complaint was tested by habeas corpus.

Mr. Justice Brown, speaking for the unanimous Court, said:

> "The first two complaints, which were dismissed, as well as the first count of the complaint under which the proceedings were finally had, were obviously insufficient, since the charges were made solely upon information and belief, and no attempt was made even to set forth the sources of information or the grounds of affiant's belief. This is bad, even in extradition proceedings, which are entitled to as much liberality of construction in furtherance of the objects of the treaty as is possible in cases of a criminal nature. * * *
>
> "A citizen ought not to be deprived of his personal liberty upon an allegation which, upon being sifted, may amount to nothing more than a suspicion."

The leading case of the Second Circuit is *U. S. v. Ruroede*, 220 Fed. 210 (1915), in which case the complaint alleged, upon information and belief, that the defendants conspired to defraud the United States, and that the defendant Ruroede had an interview with another defendant on a certain date. The complaint further stated that the source of complainant's information and the grounds for his belief were based upon an official investigation; a statement which is at least more than is contained in Calhoun's complaint in the case at bar. It did not state any further facts as to the information and belief and how it was secured.

The opinion of the Court at page 213 contained the following statement:

> "While the government in any case is justified as far as possible in keeping secret its evidence until a matter has been submitted to the grand jury, it cannot, I think, sustain a warrant of arrest for any reason or under any circumstances, where neither the warrant nor the complaint state facts constituting the crime that is charged, even though the prisoner has at the hearing waived examination."

In the very recent case of *United States ex rel. King v. Gokey*, 32 Fed. (2d) 793 (1929 D. C. N. D. N. Y.), the precise point was discussed by District Judge Bryant in the following language:

> "If the complaint is made on information and belief, it must give the grounds of belief and sources of information. A complaint not based upon the complainant's personal knowledge, and unsupported by other proof, confers no jurisdiction upon the commissioner to issue a warrant."

Citing:

*United States v. Baumert*, 179 Fed. 735.
*United States v. Wells*, 225 Fed. 320.
*United States v. Ruroede*, 220 Fed. 210.
*In re Blum*, 30 N. Y. S. 396.

Agent Calhoun's affidavit fails to state a single fact except that one of the defendants bought a Peerless automobile. Clearly this is not a sufficient compliance with the standard laid down by the cases.

This Court held in *Byars v. United States*, 273 U. S. 28, that a search warrant based upon an affidavit

which stated only that the affiant had good reason to believe and did believe that the defendant had in his possession intoxicating liquors, instruments and materials, was clearly bad as tested by the Fourth Amendment and the Espionage Act.

(*b*) *Even assuming the warrant of arrest to have been properly issued, the arrest under it was nevertheless invalid because it was not executed by a United States Marshal or one of his deputies.*

The warrant in this case was directed "To the Marshal of the United States for the Southern District of New York and to his deputies or any or either of them." (R. 18.) It contained no direction to anyone else and it conferred no authority on the Prohibition Agents who used it as their authority for the arrest and search.

This question has arisen in the Federal courts on numerous occasions where it has been held that a warrant must be strictly construed and that it confers authority for its execution only upon the persons to whom it is directed.

A case directly in point is *United States v. McHie*, 194 Fed. 894. In that case a petition was made for the return of papers seized incidental to an arrest. A warrant had been issued to the United States Marshal and his deputies on the affidavit and complaint of one "S", special agent of the Department of Justice, for the arrest of the defendant and others. "S" and other special agents took the warrant and made arrests and also made incidental searches and seizures. Many of the facts in that case are strikingly similar

to the facts in the case at bar. The crime charged was a felony, using the mails to defraud. Later the marshal, after some persuasion, agreed to file a return of the warrant. The Court, in holding that the arrest was illegal, said:

> "The officers of the government, deriving their authority from the Department of Justice, acted in a most unjust and unnecessarily lawless manner. * * * They did not even insure the presence of the marshal, although making an entirely extravagant and wholly unnecessary show of force. * * * Even in such desperate cases as counterfeiting, the rules of the Secretary of the Treasury expressly deprecate arrests without warrant, and prohibit searches and seizures without a search warrant, except in cases of arrest. Secret Service Rules, Arts. 3, 9.
>
> * * * * * * *
>
> The arrest having been made without warrant because of the absence of a marshal or deputy, the seizures were unlawful on this ground."

In *Shephard v. Adams* (1898), 168 U. S. 618, Mr. Justice Shiras, speaking for the majority of the court, said at page 624:

> "All writs and processes issuing from a Federal court must be under the seal of the court and signed by the clerk, and bear teste of the judge of the court from which they issue. Sec. 911, Revised Statutes. The processes and writs must be served by the marshal or by his regularly appointed deputies. Secs. 787 and 788, Revised Statutes."

In *Perry v. United States* (1926 C. C. A. 9), 14 Fed. (2d) 88, the Circuit Court of Appeals for the Ninth Circuit reversed a judgment of conviction for violation of the National Prohibition Act on the ground that the lower court had admitted in evidence certain papers and documents seized under a search warrant directed to "The Federal Prohibition Director in and for the State of California and to his assistants, agents, and inspectors and any or either of them" and the warrant had been executed by a general prohibition agent who was not within the above category. In rendering its opinion the court said:

> "We, therefore hold that the direction in the search warrant was an essential part of it, and that because the plain language of the statute was disregarded, not alone in respect to the direction to those officers who were authorized to serve, but also in respect to those who did serve it, the objections to the warrant and to the use of the evidence obtained and the search were well taken and should have been sustained. *United States v. Dziadus*, 289 Fed. 837; *United States v. Innelli*, 286 Fed. 731."

In *United States v. Mitchell* (1915), 223 Fed. 805, the rule was clearly stated by the District Court for the Eastern District of New York, as follows:

> "If the marshal is commanded by the writ to serve it, no other person may perform that duty, although the State law may authorize such service by a private person. (*Schwabacker v. Reilly*, 2 Dill. 127, Fed. Cas. No. 12,501.)"

In the case at bar, the District Court in its opinion held (R. 55):

> "It is conceded that the warrant of arrest, addressed to the marshal of the district, could not be executed by prohibition agents even though acting on official business. It is not disputed, either, that the warrant was invalid in that the complaint was palpably insufficient, and no attempt is made by the Government to justify the seizure on the basis of the warrant."

And the District Judge, even though denying the motion of the petitioners for the return of the seized property felt constrained to conclude his opinion as follows (R. 57):

> "In disposing of this motion, as above indicated, I do not wish to be understood as approving the practice followed by the Government in making these arrests. I can see no adequate reason why arrests of this kind should not be made by the United States Marshal under valid warrants issued in advance, and I think it would be most unfortunate if any other practice should be generally followed."

(c) *No felony or misdemeanor had been committed or carried on in the presence of the officers.*

The Government concedes that the warrant of arrest was based upon an insufficient complaint and was addressed to the marshal instead of to the prohibition agent and now contends that this did not invalidate seizure as an incident to arrest on the ground that the arrest was one that could lawfully be made without a warrant. (R. 15, 86).

No offense was committed in the presence of the officers who made the arrest in the case at bar. Nothing appears to indicate that lawful grounds existed for suspecting a violation of the law occurring in the offices of petitioners.

The situation in the case at bar is similar to that in *United States v. McIlie, supra.* There a special agent of the Department of Justice attempted to execute warrants of arrest addressed to the United States Marshal. He entered a business office and made arrests under these warrants. As in the case at bar, the Government sought to sustain the arrests on the ground that an arrest without a warrant could be made under State statutes. This contention the Court overruled, saying:

> "It is, however, sought to justify the seizure on the ground that the persons arrested were found actually in the perpetration of a crime, and could be arrested without warrant, under the Illinois statute; and thus, the arrest being lawful, the seizure was also valid under the Dillon and Mills cases. It is sufficient to say, in answer to this position, that the seizure was unreasonable, no matter what technical power may have been behind it. Moreover, *it would be a most surprising extension of the law of arrest without warrant to justify the seizure of peaceable persons, sitting quietly in their offices, on the ground that they were carrying on some business made criminal by some statute, or had formerly committed such an offense.* On this theory, all the officers, agents, and servants of the American Tobacco Company, for example,

> would have been subject to arrest without warrant by anyone, officer or layman, because they were prosecuting an unlawful combination. Such a doctrine has no foundation, either in reason or necessity, and is utterly opposed to the Fourth Amendment to the Constitution." (Italics supplied.)

By Section 2, Title II of the National Prohibition Act, (27 U. S. C. A. Sec. 11), prohibition officers are given the power of swearing out warrants. By Section 25 (27 U. S. C. A. Sec. 39) they are empowered to execute search warrants. By Section 26 (27 U. S. C. A. Sec. 40) they are directed to seize all vehicles on land or water which they "discover" to be carrying liquor and arrest the person in charge.

In *United States v. Di Corvo*, 37 Fed. (2d) 124 (D. C. Conn.), Judge Thomas discussed very fully the powers of prohibition agents to make arrests without warrant. He said (p. 128):

> "A search of the statutes, however, fails to reveal the grant of any such general police power to prohibition agents. The scope of their power to search and arrest is determined by sections 2, 25 and 26 of title 2 of the National Prohibition Act (27 U. S. C. A. Secs. 11, 39, 40). In none of these sections are prohibition agents vested with the general powers of a peace officer.
>
> * * * * * * *
>
> "Prohibition agents are to investigate and report violations of the Prohibition Act to the United States Attorney who is charged with the

> duty of prosecution. They may swear out warrants for the apprehension of offenders. Section 1014 of the Revised Statutes (18 U. S. C. A., Sec. 591) is made applicable. That section, instead of making provision for arrest without a warrant, empowers local magistrates to apprehend offenders against the Federal laws, and adopts the State practice in the matter of issuing and executing criminal process. The whole section is fraught with the presupposition that arrests are to be made only upon judicial process.
>
> . . . . . .
>
> "*Title* 2, *Sec.* 26 (27 *U. S. C. A. Sec.* 40) *is the only section granting the right to prohibition agents to effect an arrest without process.* But that section is limited to cases where the agent discovers the person in the act of transporting intoxicating liquor and, in the instant case, no such fact appears." (Italics supplied.)

It was, therefore, held that the search and seizure without a warrant was illegal and the evidence obtained was suppressed.

*Counsel has found no case holding, even by implication, that a prohibition agent has the power to arrest for a felony not committed in his presence.* The furthest that the cases go is to hold that an agent of the Commissioner of Internal Revenue may arrest for a crime, either for a felony or misdemeanor, when the crime is committed in his presence. This was the holding in *Rouda v. United States* (1926, C. C. A. 2d), 10 Fed. (2d) 916.

In *United States v. Rembert*, 284 Fed. 996, 1006 (1922 D. C. Texas), the court said:

> "An offense occurs in the presence of an officer and a discovery may be said to have been made by the * * * officers when the evidence of their senses induces them to believe upon reasonable grounds for belief that an offense is being committed."

We submit that by no use of the officers' five senses in the case at bar could they have had grounds for belief that the crime of conspiracy was being committed by petitioners at the time of their arrest.

*(d) The officers had no reasonable grounds for believing that a felony had been committed.*

"Probable cause" is defined in *Carroll v. United States*, 267 U. S. 132, 161, where the court quotes with approval from *Stacey v. Emery*, 97 U. S. 642, 645, as follows:

> "If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing the offense has been committed, it is sufficient."

In *Dumbra v. United States*, 268 U. S. 435, 441, this court said:

> "In determining what is probable cause, we are not called upon to determine whether the offense charged has in fact been committed. We are concerned only with the question whether the affiant had reasonable grounds at

> the time of his affidavit and issuance of the warrant for the belief that the law was being violated on the premises to be searched; and if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe there was a commission of the offense charged, there is probable cause justifying the issuance of a warrant."

The courts below sustained the validity of the arrests without a valid warrant in the case at bar upon the principle that the person making the arrest had probable cause for believing the person arrested guilty of the crime charged, and cited in support of this doctrine a number of cases, all of which with one exception involved instances where the officers arrested upon the evidence of their senses, that is in all of which they were made aware by the sense of sight or smell that a crime was being committed in their presence. These decisions cited by the courts below are:

*Lee Kwong Nom v. United States*, 20 Fed. (2d) 470.
*Vachina v. United States*, 283 Fed. 35.
*Dowling v. Collins*, 10 Fed. (2d) 62.
*Brady v. United States*, 300 Fed. 540.
*King v. United States*, 1 Fed. (2d) 931.
*White v. United States*, 16 Fed. (2d) 870.
*Prichett v. Sullivan*, 182 Fed. 480, 482.
*United States v. Rembert*, 284 Fed. 996.
*Stallings v. Splain*, 253 U. S. 339, 342.

The one exception to the rule referred to above is Stallings *v.* Splain, *supra*, which involved an extradi-

tion and in which this Court following Rice *v.* Ames, 180 U. S. 371, also cited above, held that the utmost liberality of construction is to be given extradition cases.

The case at bar differs from the cases cited in that here there is no claim that a crime was being committed in the presence of the officers when they entered the suite at 200 Fifth Avenue. If any such claim were made it would be contrary to fact and reason. In this case also the validity of the arrests cannot rest upon anything seen, heard or smelled by the agents at the time they entered the premises to make the arrests, but must rest entirely upon what Agent O'Brien knew before he went to the premises on June 6, 1929.

In October, 1929, over four months after the arrests in question, Agent O'Brien made an affidavit (R. 30) in which he claimed that, prior to the arrests, Agent Calhoun had related to him information which had been related to Calhoun by Braidwood as contained in Braidwood's affidavit (R. 21) also made in October, 1929, four months after the arrest. Agent Calhoun made affidavit (R. 28) also in October, 1929, that, prior to the arrests, Braidwood had related to him the facts contained in the Braidwood affidavit. Therefore, *to sustain this arrest it must be held that O'Brien, possessing no greater power than that of a private citizen, had a right to arrest upon the unsworn statements of another private citizen, not even made directly to the arresting citizen, but through a third person.*

It will be noted that when Calhoun swore to the complaint upon which the warrant of arrest in this

case was issued, he made no statements therein which are contained in the Braidwood and O'Brien affidavits, but contented himself with alleging "upon information and belief" that the petitioners herein and others had conspired to *commit a nuisance against the United States* in possessing, selling, etc., intoxicating liquor "beginning on January 1, 1929, and continuing on each and every day thereafter down to and including the date of the filing of this complaint" viz. June 5, 1929. No overt act was set forth in the complaint except the purchase of one Peerless automobile on May 23, 1929.

It is submitted that if Calhoun's complaint is bad and the warrant issued under it invalid because of the failure to state facts showing probable cause, then O'Brien must be concluded upon what Calhoun stated on June 5, 1929. If O'Brien is now to be permitted to state additional facts which are alleged to have been known to both Calhoun and himself at that time and thereby to justify an arrest as though it were an arrest made entirely without a warrant, then both the spirit and the letter of the Fourth Amendment have been violated and it is difficult to see how any proper curb can be put upon the illegal and improper practices of arresting officers such as occurred in this case.

A further and insurmountable objection to the arrests is that there is not a scintilla of evidence in this case (even third hand) giving probable cause for the belief that the defendants, at the time of the arrests, were then engaged in the commission of a felony. Although the insufficient complaint of Calhoun alleges a conspiracy beginning on January 1st, 1929, and con-

tinuing to June 5, 1929, and the arrests were made on June 6, 1929, the information alleged to have been furnished by Braidwood related to alleged transactions between March, 1927, and September, 1928. There was no information furnished as to any alleged transactions from September, 1928, to June 6, 1929, when the arrests were made. Therefore, a period of nine months had elapsed between the date of the last transaction alleged by Braidwood and the date of the arrests.

This does not constitute probable cause for belief that the defendants were engaged in violation of law at the time of the arrests.

In the case of *United States v. Dziadus*, 289 Fed., 837, the Court held that an averment in an affidavit to the effect that, three months previously, a still was found on the premises was insufficient to establish probable cause for believing that the premises were being used for the unlawful sale of intoxicating liquor.

In *Rupinski v. United States*, 4 Fed. (2d) 17, the Circuit Court of Appeals for the Sixth Circuit held that the affidavit of a single sale, over two months before the making of an affidavit for a search warrant, was insufficient to justify the issuance of the warrant.

In *Dandrea v. United States*, 7 Fed. (2nd) 861, the Circuit Court of Appeals for the Eighth Circuit held that an affidavit that liquor was purchased 42 days before execution of the affidavit was not sufficient to show a present existing cause.

In *People v. Chippewa Circuit Judge*, 226 Mich. 326, 328, 197 N. W., 539, 540, where more than 60 days

had elapsed between the making of the affidavit and the application for a search warrant, the Court said:

> "A search warrant must issue, if at all, upon an *existing cause*. A search warrant is no general arm for ferreting out crime, but a special proceeding, based on present cause, hedged by strict constitutional provisions, must be speedily executed, and cannot be issued on a showing of facts existing over 60 days before, and not in any way brought down to the date the warrant is issued." (Italics supplied.)

We submit it is obvious that, if probable cause did not exist for the issuance of a warrant at the time of the arrests, probable cause did not exist for an arrest without a warrant.

(*e*) *Reasonable or probable cause does not exist where the officer obtained his information solely from a superior officer who in turn obtained it from the unsworn statement of another.*

If anything the policy of the law would seem to demand a higher quality of probable cause in a case where there is no submission of the supposed probable cause to a magistrate or a judicial officer before it is acted upon and before the arrest is made, than is demanded in warrant cases.

O'Brien could not have sworn to a complaint for a warrant of arrest. He himself had no knowledge that a felony had been committed, or that Gowen or Bartels had committed it. He only know what Calhoun had told him, which in turn had been told to Calhoun by

Braidwood. Even Calhoun could not have made a proper affidavit. The only person in the chain of information who had obtained testifying knowledge was Braidwood himself.

This brings us to the real situation in all its nakedness. O'Brien, standing at best in the position of a private citizen, claims he had probable cause when all he had was information twice removed, plus a belief and information coming from Calhoun who himself had no powers greater than those of a private citizen, and Calhoun in turn received his information from Braidwood who was only a private citizen and not connected with the Prohibition Service at all.

*O'Brien must therefore rely for his probable cause upon Braidwood to whom he never spoke, whom he never met, and whose story was told him at second hand by Calhoun. This is probable cause twice removed and thus doubly dangerous.* (See affidavits of O'Brien, R. 30; Calhoun, R. 28; and Braidwood, R. 21.)

The two lower courts have held in the case at bar that the information constituting probable cause may be obtained from others as well as from personal observation, and cite certain cases in support of that ruling which we submit are not in point and do not apply to the facts in this case.

The principal case cited by the lower courts is that of *Carroll v. United States*, 267 U. S. 132, which involved the search and seizure of an automobile found to be carrying intoxicating liquors and the arrest of the driver thereof, without a warrant.

There are many distinctions between the Carroll case and the case at bar.

Two of the officers who made the search and seizure had personal knowledge that the automobile in question was used for the transportation of liquors, they having negotiated with the defendants for the purchase of liquor and the defendants had come to the apartment where the negotiations were carried on in the automobile which the agents subsequently searched and seized. This court found that probable cause existed based upon "the facts and circumstances *within their knowledge* and of which they had reasonably trustworthy information." (p. 162.)

A further distinction between the two cases is that in the Carroll case the ruling was in justification of the seizure primarily and the arrest followed as a corollary of such seizure. The court held that, under Section 26, Title II, of the National Prohibition Act, the primary purpose is the seizure and destruction of the contraband liquor being transported and the provisions for forfeiture of the vehicle and arrest of the transporter are merely incidental. The court referred to the argument of the defendant that the seizure can only be justified if the arrest is valid, and said (p. 158):

> "The theory is unsound. The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law."

*In the case at bar, the arrest must be sustained; otherwise, the seizure was unlawful.*

A still further and controlling distinction between the two cases is found in the fact that the Carroll case involved principles to be applied to movable vehicles which have no application to the present case. This court pointed out the difference in its opinion (p. 153) when it said:

> "We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a *necessary difference* between a search of a store, dwelling house or other structure in respect of which *a proper official warrant readily may be obtained*, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." (Italics supplied.)

Further on in this opinion, this court said (p. 156):

> "In cases where the securing of a warrant is reasonably practicable, it must be used, and when properly supported by affidavit and issued after judicial approval protects the seizing officer against a suit for damages. In cases where seizure is impossible except without a warrant, the seizing officer acts unlawfully and at his peril unless he can show the court probable cause. *United States v. Kaplan*, 286 Fed. 963, 972."

In the instant case, the premises which the officers entered could not be moved away and it was the duty of the officers, assuming the existence of probable cause sufficient to support a warrant, to obtain a proper official warrant before they entered the premises and made the arrests and seizures.

In the light of the above discussion of the Carroll case, we think it is clear that it does not authorize prohibition officers to arrest without a warrant persons quietly in their offices, their only information being third hand information that the persons are engaged in a conspiracy to violate the Prohibition Act.

That, even in the case of moving vehicles, the officers making the seizure without a warrant must have knowledge that the law is being violated is established by the case of *Gambino v. United States*, 275 U. S. 310, in which this court held that the search of an automobile by New York State troopers and the seizure of intoxicating liquor found therein was without probable cause and the admission in evidence of the liquor so seized violated the Fourth and Fifth Amendments.

As the Carroll case is not an authority for the contentions of the Government in this case, the other cases cited by the courts below are no stronger. They involve probable cause based upon evidence of the senses of the arresting officers. In *Brady v. United States*, 300 Fed. 540, there were the suspicious actions of the driver of a car; in *King v. United States*, 1 Fed. (2d) 931, positive information that defendant was transporting opium (another automobile case); in *White v. United States*, 15 Fed. (2d) 870, evidence of sales of

cocaine; in *United States v. Rembert,* 284 Fed. 996, the driving of a car by a person who was obviously intoxicated.

In *Schencks v. United States,* 2 Fed. (2d) 185, 186, the Court of Appeals of the District of Columbia said:

> "If the peace officer has reason to believe and does believe that a search or seizure ought to be made, he should state in his affidavit the facts which led him to that conclusion, and which were known to him of his own knowledge. If he has no first-hand information as to the material facts, but has been informed by another as to the facts or conditions which would justify the issuance of process for search or seizure, the officer should secure the informer's affidavit positively alleging of the latter's own knowledge the existence of such facts or conditions. * * * To permit them to search for evidence * * * *because they were informed and believed that certain facts existed, would leave the home, the property, and the person of the citizen at the mercy of mere suspicion, and of misstatements and misinformation for which no one could be held accountable.*" (Italics supplied.)

In *Director General v. Kastenbaum,* 263 U. S. 25 (1923) a railroad detective accompanied by two city policemen arrested defendant without a warrant upon a suspicion of his being connected with the theft of butter from a freight car. After being released on bail, he was brought to hearing before a magistrate on a charge of grand larceny, and after four or five ad-

journments at the instance of the prosecution, the magistrate discharged Kastenbaum. This court said (p. 28):

> "Good faith is not enough to constitute probable cause. That faith must be grounded on *facts within the knowledge* of the Director General's agent which in the judgment of the court would make his faith reasonable." (Italics supplied.)

In *Lawson v. United States*, 9 Fed. (2d) 746 (C. C. A. 7th) the court said "this probable cause must be determined by the existence of facts known to the officer before and not after the search."

In *Elrod v. Moss*, 278 Fed. 123 (C. C. A. 4th), the court said at page 130:

> "Under the federal as well as the state statutes, to justify search and seizure or arrest without warrant, the officer must have *direct personal knowledge* through his hearing, sight or other sense, of the commission of crime by the accused." (Italics supplied.)

In *Lochnane v. United States*, 2 Fed. (2d) 427 (C. C. A. 9th) the Court quoted from *Giles v. United States*, 284 Fed. 208, 214, as follows:

> "It is not enough that the form of this affidavit leaves it possible that the affiant might have personal knowledge as to the possession of intoxicating liquor and as to facts tending to show that such possession was illegal. It should have affirmatively appeared that *he had personal knowledge* of facts competent for a jury

> to consider, and the facts, and not his conclusion from the facts, should have been before the commissioner." (Italics supplied.)

In *United States v. Baumert*, 179 Fed. 735 (D. C. N. D. N. Y), Judge Ray stated that the person who states the facts must speak from personal knowledge as follows (p. 742):

> "Under the common law the information was not necessarily verified; but, as stated, this led to abuses and the adoption of the Fourth Amendment to the Constitution, which in legal effect demands that no warrant shall issue upon an information filed by the United States attorney, unless it states *facts*, a crime, etc., and is supported by the oath of the officer filing it, *who must speak from personal knowledge, or by the oaths or affirmations of others who speak from personal knowledge.*" (Italics supplied.)

See also:

*United States v. Tureaud*, 20 Fed. 621.
*United States v. Wells*, 225 Fed. 320.
*Weeks v. United States*, 216 Fed. 293, 301.
*In re Blum*, 30 N. Y. Supp. 396, 9 Misc. 571.

In *Comfort v. Fulton*, 39 Barb. 56, (1861), Peckham, J. declares:

> "In this case information from his son by the complainant was no proof whatever. It cannot be by any possibility 'probable cause supported by oath'."

(*f*) *Probable cause which is insufficient as the basis of a warrant of arrest is insufficient to justify an arrest without a warrant.*

*Brown v. United States,* 4 Fed. (2d) 246 (C. C. A. 9th), was a case where the arresting officer acted only on suspicion. The court held that the arrest was illegal and applied the test whether a warrant of arrest could have issued on the information in the officer's possession and said, at page 247, in reversing the conviction of defendant:

> "If, instead of arresting the plaintiff in error, the officer had presented all the facts within his knowledge and all the information at hand to a magistrate, no magistrate would issue a warrant of arrest for the plaintiff in error; no magistrate would hold the plaintiff in error to answer for a crime before another tribunal; no grand jury would indict; no court would submit the case to a jury; and, if the officer were sued for false imprisonment, no court would instruct that the arrest was justified, assuming all the foregoing testimony to be true."

The case thus squarely lays down the proposition that where there is a lack of probable cause for the issuance of a warrant, there is also, necessarily, a lack of probable cause for arrest without a warrant.

*Cornelius, on Searches and Seizure* (1926), at page 279, also lays down the rule that the probable cause in the case of an arrest without warrant should be of the same quality as probable cause required for the issuance of a warrant:

> "The term 'probable cause' used in connection search warrants is a convertible term with 'probable cause' used in connection with arrest without warrant for suspicion of felony, and is the same term used in actions for malicious prosecution or for false arrest or imprisonment."

In *Malcolmson v. Scott* (1885), 56 Mich. 459, the defendant's were police officers. They received a letter from J. H. in the name of the Chief of Police of Philadelphia stating that the plaintiff had absconded with funds of a lodge, and describing bonds and money taken and giving a description of the plaintiff and means of his identification, and on this information they arrested the plaintiff without a warrant. Held, that this was insufficient probable cause, and the court said at pages 463-464:

> "If the act had been done here, and no other facts were alleged than this letter shows, no crime would be charged, and if all were set out in a warrant, the warrant would be void. * * * It is difficult to see how that would be reasonable cause without a warrant, which would not be under a warrant."

See also:

*Simmons v. Vandyke* (1894), 138 Ind. 380, a case similar in its facts to *Malcolmson v. Scott.*

In the case of *Henderson v. United States*, 12 Fed. (2d) 528, the Circuit Court of Appeals for the Fourth Circuit held that where the securing of a warrant for arrest was reasonably practicable it must be done, and

that an arrest and search executed without a warrant under such circumstances were invalid.

In the course of its opinion the court said:

> "Can it be the law that an officer for the purpose of seeking evidence may invade the home of a citizen and search it without the oath or affirmation required by the Constitution and without having the question of probable cause determined by a judicial officer; upon merely deciding for himself that there is probable cause to believe that some person within the home is guilty of a felonious violation of a Revenue Act?"

SECOND POINT.

## THE SEARCH AND SEIZURE OF PETITIONERS' BOOKS AND PAPERS WAS AN "UNREASONABLE SEARCH AND SEIZURE" IN VIOLATION OF THE FOURTH AND FIFTH AMENDMENTS.

(*a*) *A general exploratory search of the office of petitioners in which they were arrested, made without the authority of a search warrant, is illegal.*

In support of the proposition we rely on the celebrated case of *Boyd v. United States*, 116 U. S. 616, which Mr. Justice Brandeis characterized as "a case that will be remembered as long as civil liberty lives in the United States" (see *Olmstead v. United States*, 277 U. S. 438, 474). That case laid down the great principle that a man's books and papers cannot be forcibly seized and used in evidence against him. Mr. Justice Bradley speaking for the court said (p. 623):

> "The search for and seizure of stolen or forfeited goods or goods liable to duties and con-

cealed to avoid the payment thereof are totally different things *from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him.* The two *things differ toto coelo.* In the one case, the Government is entitled to the possession of the property, in the other it is not. * * *

"In order to ascertain the nature of the proceedings intended by the Fourth Amendment to the Constitution under the terms 'unreasonable searches and seizures,' it is only necessary to recall the contemporary or then recent history or the controversies on the subject, both in this country and in England. The practice had obtained in the Colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English Liberty and the fundamental principles of law, that ever was found in an English law book'; since they placed 'the liberty of every man in the hands of every petty officer.' This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. 'Then and there,' said John Adams, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.' "

The doctrine of the *Boyd* case has been often approved by this court and has been followed in a num-

ber of cases. *Weeks v. United States*, 232 U. S. 383; *Silverthorne Lumber Co. v. United States*, 251 U. S. 385; *Gouled v. United States*, 255 U. S. 298; *Carroll v. United States*, 267 U. S. 132.

There is nothing in the case of *Marron v. United States*, 275 U. S. 192, so strongly relied upon by the courts below, to overrule the *Boyd* case or to authorize the general and exploratory search undertaken in the case at bar.

Indeed Mr. Justice Butler cited the *Boyd* case in the opinion in the *Marron* case and quoted with approval from the language of Mr. Justice Bradley.

But if the contention of the Government is adopted on this appeal and it is held that the *Marron* case authorizes seizure of the papers and documents in the instant case, it would be necessary to say that the *Marron* case overrules the *Boyd* case, something which probably was furthest from the mind of the court.

Prior to the *Marron* decision, the Circuit Court of Appeals below had decided in *United States v. Kirschenblatt*, 16 Fed. (2d) 202, that:

> "the whole of a man's correspondence, his books of account, the record of his business, in general the sum of his documentary property, these in our judgment are as inviolate upon his arrest as they certainly are upon search warrant."

Now, since the *Marron* case, the same court holds in the case at bar that:

> "In *United States v. Kirschenblatt* this court laid down a different rule, but we do not think it can stand after the Marron decision." (R. 77.)

We believe it can be demonstrated readily that the lower court misinterpreted the ruling of this court in the *Marron* case.

In that case, there was a *valid* search warrant; the officers thereupon made a *lawful* search of the premises; while making such lawful search they *saw* intoxicating liquors being *unlawfully* sold, whereupon they *lawfully* arrested, without a warrant, a person there actually in charge of the premises and actually engaged, *in the presence of the officers*, in a conspiracy to maintain them. The documents seized were incidentally discovered while the officers were searching for liquor.

In the present case, there was no valid search warrant or warrant of arrest; the entry of the officers on the premises was *unlawful;* no violation of law was taking place in their presence. Notwithstanding the absence of any authority so to do, the officers ransacked petitioners' premises upon the false representation that they possessed a search warrant; under threat of breaking into his desk and safe, forced petitioner Gowen to open them, and removed from them and from other desks in other rooms private papers, documents and property belonging to the petitioners.

The Government accepted the decision in *United States v. Kirschenblatt* and did not apply for certiorari. The difference between the facts in the *Kirschenblatt* case and in the *Marron* case is pointed out in the Government's brief filed in this court in opposition to Marron's petition for certiorari, the following quotation being taken from page 12:

"There are statements in that opinion which indicate that the court believed that the only incriminating papers (not contraband or instruments of the crime) which may be seized as incident to a lawful arrest are those found on the person of the man arrested; *but the record in that case showed that to disclose the incriminating documents the officers ransacked the premises in a high-handed way, not to discover contraband articles described in the warrant but merely to obtain incriminating documents, and it was for this reason that the United States made no application for certiorari to review that decision.*

"There was in the instant case no rummaging among defendant's papers for incriminating evidence.

"Whether a search and seizure are reasonable must depend upon the facts in each particular case. At the time of the seizure in the instant case the officers were engaged in the execution of a valid warrant directing the search of the premises for intoxicating liquor and property designed for its manufacture. They had no warrant for the seizure of papers *nor was any general search made therefor.* The documents seized were *incidentally discovered* while the officers were searching for liquor."

As pointed out in the Government's brief, in the *Marron* case, no general search was made, the documents seized were incidentally discovered. Not so, in the present case. Hence we submit that the *Marron* decision does not authorize a general search and seizure of private documents and papers, and that the

**seizure in this case was unconstitutional under the doctrine laid down in Boyd v. United States, supra.**

*(b) The seizure of books and papers located on premises where an arrest is made is illegal where the books and papers are not the means or fruits of the crime but are merely private papers of the petitioners.*

As we have stated heretofore, in the courts below the decision in the case of *Marron v. United States*, 275 U. S. 192, was relied upon to sustain the validity of the search and seizure of the books and private papers. The Circuit Court of Appeals said:

> "This case the appellants attempt to distinguish upon the ground that the papers and ledger there seized were instruments of the crime of maintaining a nuisance while here the papers and documents are merely incriminatory evidence of the crime of conspiracy. We do not think the distinction can be sustained. * * * We regard the Marron case as controlling and as sustaining the seizure in suit."

For the reasons heretofore stated, we respectfully submit that what is said about the *Marron* case in sustaining the validity of the seizure of books and papers is inapplicable in the present instance.

It is also difficult to see how the Government can take the position that these papers are instruments of crime when O'Brien's own affidavit indicates that he thought of them as evidence and not as instruments of crime, because in referring to the papers and documents, he says:

> "• • • All of which pertained on the face thereof to unlawful dealings by the said Gowen and Bartels in intoxicating liquors." (R. 33.)

In *United States v. Kirschenblatt* (C. C. A. 2d), 16 Fed. (2d) 202, 203, a warrant was issued to search the offices of one Kirsch. Kirschenblatt was arrested and a quantity of papers of various kind was seized. The Circuit Court of Appeals held that the arrest of Kirschenblatt was legal, but it affirmed the order of the District Court directing the return of all the papers seized. Judge Learned Hand, speaking for the unanimous court, said:

> "Whatever the casuistry of border cases, it is broadly a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him, once you have gained lawful entry, either by means of a search warrant or by his consent." Citing *Carroll v. United States*, 267 U. S. 132; *Agnello v. United States*, 269 U. S. 20; and *Gouled v. United States*, 255 U. S. 298.

In *Kirvin v. United States*, 5 Fed. (2d) 285, the Circuit Court of Appeals for the Second Circuit had earlier passed on this question and held as follows:

> "It is next contended that the officers who were executing the warrant were lawfully on the premises, and that, being there, they might seize the papers. But as to the records they had no search warrant. They were as trespassers in taking these documents. It is further argued that the plaintiff in error was ar-

> rested at the time the papers were seized and therefore the seizure was lawful. *U. S. v. Kraus* (D. C.) 270 Fed. 579. But the papers were not on his person, and the distinction has been recognized between what one carries about on his person and what one keeps in his house" (page 285).

In *United States v. Poller* (D. C. S. D. N. Y., Jan. 16, 1930), Judge Coleman held that defendants had lawfully been arrested in their place of business, but directed that the papers seized on the premises should be returned to them. In the course of his opinion he expressly pointed out that the *Marron* case did not overrule the *Kirschenblatt* case, saying:

> "These lawful arrests, however, I do not think justified the agents in ransacking the respective premises and seizing every scrap of documentary evidence they could lay their hands on. Assuming that they confined their search to the rooms in which the arrests were made, they had no right to examine the defendant's books and documents merely for the purpose of getting evidence against them. * * * In the case at bar the premises searched and the documents seized had no such relation to the crime."

In the light of this decision it is respectfully submitted that even if the arrest was a lawful one, the search and seizure were unlawful. See also *United States v. Spallino* (D. C. W. D. N. Y., 1927), 21 Fed. (2d) 567, and *United States v. Epstein* (D. C. E. D. N. Y., 1929), 33 Fed (2d) 982. On that ground alone

the District Court should have granted the motion for the return of the papers and the suppression of their use as evidence, and the failure to do so constituted a violation of the constitutional rights of petitioners

(c) *A search to secure evidence to be used against defendants in a criminal proceeding is within the constitutional prohibition.*

In *United States ex rel. Frank v. Mathues*, 17 Fed. (2d) 274, the District Court for the Eastern District of Pennsylvania, said:

> "There seems to be an impression, and it is justified by some of the decisions, that the search of other premises than a dwelling house is lawful, if the searching officer without a search warrant has contrived to intrude himself upon the premises without the permission of the owner or occupant, and if he then perceives, through his senses, whether of sight, sound, taste, smell, or touch, the evidence of crime, he is justified in making a seizure. In other words, that he has then put himself under the protection of the common-law rule justifying a seizure and arrest, because of the result of his unwarranted search, rather than because of a lawful entry. * * * Excepting, therefore, cases where an officer is already lawfully upon the premises, and not there as a trespasser, Congress intended that access should be obtained under the authority of a search warrant. Entrance upon premises with an invalid search warrant is of the same effect as with no search warrant."

In *Gouled v. United States*, 255 U. S. 298, 305, this court has held:

> "The prohibition of the Fourth Amendment is against all unreasonable searches and seizures and if for a Government officer to obtain entrance to a man's house or office by force or by an illegal threat or show of force, amounting to coercion, and then to search for and seize his private papers would be an unreasonable and therefore a prohibited search and seizure, as it certainly would be, it is impossible to successfully contend that a like search and seizure would be a reasonable one if only admission were obtained by stealth instead of by force or coercion. The security and privacy of the home or office and of the papers of the owner would be as much invaded and the search and seizure would be as much against his will in the one case as in the other, and it must therefore be regarded as equally in violation of his constitutional rights.
>
> * * * * * * *
>
> "In practice the result is the same to one accused of crime, whether he be obliged to supply evidence against himself or whether such evidence be obtained by an illegal search of his premises and seizure of his private papers. In either case he is the unwilling source of the evidence, and the Fifth Amendment forbids that he shall be compelled to be a witness against himself in a criminal case."

In *United States v. Friedberg*, 233 Fed. 313, 318, (D. C. E. D. Pa. 1916) under a search warrant author-

izing search of petitioner's place of business for tobacco, petitioner's private papers, both at his place of business and at his private residence, were examined and seized. The Court said as follows:

> "The Government seeks to justify the seizure entirely upon the ground that the papers are to be used as evidence upon which the Government intends to prove the guilt of the defendant in a criminal prosecution and to forfeit his property in the proceedings in rem contemplated under section 3453. The papers seized are not forfeitable, and hence not subject to seizure. In the seizure, the revenue officers were acting clearly beyond the authority of the warrant, without authority of law, and in violation of the petitioner's constitutional rights. The exigency of necessity for obtaining evidence in a particular case does not justify the tendency which has grown up to proceed by "raid" of the house and property of a supposed offender, rather than by the orderly process provided by law and guaranteed by the Constitution."

See also *United States v. Mills*, 185 Fed. 318 (Circuit Court, S. D. New York, 1911), where under a warrant of arrest for conspiracy to defraud the United States in connection with imported merchandise, the marshal seized not only the documents concerning the particular importation, but also all books and papers of defendant's firm covering their business as importers. It was held that such seizure was improper under the *Boyd* case.

In *Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298, 306, this court said:

> "Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire (*Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 479), and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. * * * *It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up.*" (Italics supplied.)

(*d*) *An unlawful search and seizure may not be justified by what is found.*

In *Byars v. United States*, 273 U. S. 29, this court speaking through Mr. Justice Sutherland, said:

> "A search prosecuted in violation of the Constitution is not made lawful by what it brings to light; and the doctrine has never been recognized by this court, nor can it be tolerated under our constitutional system, that evidence of crime discovered by a federal officer in making a search without lawful warrant may be used against the victim of the unlawful search where a timely challenge has been interposed."

And in *Garske v. United States*, 1 Fed. (2d) 620, 625, Judge Kenyon, speaking for the Circuit Court of Appeals for the Eighth Circuit, said:

"If the seizure is merely based upon a suspicion, and the facts are not sufficient to justify an arrest, the subsequent discovery by an examination of the evidence, secured by the seizure, that the suspicion was in fact well founded, is not sufficient to make what was unlawful at its commencement, a lawful search. *United States v. Slusser* (D. C.) 270 Fed. 818."

See also:

*U. S. v. Olmstead*, 7 Fed. (2d) 760.
*In re Lobosco*, 11 Fed (2d) 892.
*U. S. v. Spallino*, 21 Fed. (2d) 567.
*In re Oryell*, 28 Fed. (2d) 639.

THIRD POINT

**THE BOOKS AND PAPERS SEIZED SHOULD BE RETURNED TO PETITIONERS AND THE EVIDENCE OBTAINED THROUGH THE SEIZURE SHOULD BE SUPPRESSED.**

It is well settled that when properly invoked the Fifth Amendment protects every person from incrimination by the use of evidence obtained through search and seizure made in violation of his rights under the Fifth Amendment.

*Boyd v. United States*, 116 U. S. 616, 630.
*Weeks v. United States*, 232 U. S. 383, 398.
*Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 391.
*Gouled v. United States*, 255 U. S. 298, 306.
*Amos v. United States*, 255 U. S. 313, 316.

At the time of the institution of the petition there were no proceedings of any kind pending with respect to any of petitioners herein, except that a complaint charging a conspiracy to violate the National Prohibition Act had been filed against the petitioners with the United States Commissioner for the Southern District of New York. A warrant of arrest had been issued on that complaint and the defendants Gowen and Bartels had been arrested, arraigned and held in bail to answer the complaint. (R. 71.) Upon argument in the District Court this complaint and warrant were conceded to be invalid (R. 55).

*Perlman v. United States*, 247 U. S. 7 (1918) is a direct authority for the proposition that a motion for the return of seized documents and the suppression of their use in evidence is justified notwithstanding the proceedings before the United States Commissioner. The rationale of this ruling appears to be that the fact that a complaint is pending before the United States Commissioner does not mean that a criminal proceeding has been instituted against a person. Perlman had been arrested in the Southern District of New York and held by the United States Commissioner for the Grand Jury on the charge of perjury. He was subsequently indicted but his motion for the return of certain papers and documents seized from him was made prior to his indictment. The motion was denied and he thereupon appealed. The order denying the motion was reviewed by the Supreme Court. In denying the motion of the Government to dismiss the appeal on the ground that the order ap-

pealed from was an interlocutory opinion and therefore the court was without jurisdiction to review it, Mr. Justice McKenna, speaking for the unanimous court, said:

> "The second contention of the Government is somewhat strange, that is, that the order granted upon its solicitation was not final as to Perlman but interlocutory in a proceeding not yet brought and depending upon it to be brought. In other words, that Perlman was powerless to avert the mischief of the order but must accept its incidence and seek a remedy at some other time and in some other way. We are unable to concur."

In *Kirvin v. United States*, 5 Fed. (2d) 282 (C. C. A. 2d), Judge Manton held that a commissioner when he issues warrants of arrest in a preliminary hearing, is not a judge of the United States within the constitutional sense, and a preliminary examination before him is not a proceeding in any court of the United States.

In *Burdeau v. McDowell*, 256 U. S. 465, the appeal was from an order denying a motion for the return of certain documents and papers and was made before the return of any indictment. The United States Supreme Court *sub silentio* assumed its jurisdiction and reviewed the order appealed from.

Finally in *Cogen v. United States*, 278 U. S. 221, 225, this court said:

> "The independent character of the summary proceeding is clear * * * wherever the

> motion is filed before there is any indictment or information against the movant, like the motions in *Perlman v. United States*, 247 U. S. 7, and *Bardeau v. McDowell*, 256 U. S. 465; * * *"

**Conclusion.**

It is respectfully submitted that the decision of the court below should be reversed and the petition of the petitioners herein for the return of the books and papers seized and their suppression as evidence should be granted.

Respectfully submitted,

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*Of Counsel.*

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# In the Supreme Court of the United States

OCTOBER TERM, 1929

GO-BART IMPORTING COMPANY, INC., PHILIP D. GOWEN AND WILLIAM BARTELS, PETITIONERS

*v.*

THE UNITED STATES

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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